CHAIRMAN NOBER: Well, thank you very much, and thank all of you for your presentations. They were very interesting and very informative, and I thank you all for not just repeating what was in the written submissions, which I think all of us have had a chance to read.

I may ask a couple of questions first, and then defer to my colleagues, and then follow up with a few more. But I'd like to start with something that Mr. McBride said which struck me in the whole process, which is, I mean, there are three categories of things we're looking at here. And one of the -- I think the biggest and most costly is discovery.

And he said, "Look, you know, we all know what needs to be produced in these cases. We know and the railroads know. And that, I would say, would, you know, reflect my gut-level instinct coming into this, which is there have been a lot of SAC cases litigated. People pretty much know what needs to be disclosed and what doesn't need to be disclosed.

If that's the case, why, then, are we -- I mean, what is wrong with some of the proposals to put some boundaries around discovery, since everybody ultimately knows what is going to need to be produced -- you know, within reason, what are the bulk of things that need to be produced. I mean, why are we having so many fights, if that's the core feeling. You ultimately know what you need to put on a case -- you've all put on a bunch -- and the railroads know what needs to be produced as a starting point.

MR. McBRIDE: Excuse me. Mr. Chairman, the old adage "give them an inch and they'll take a mile" comes to mind. What'll happen is this. If the Board changes the standard, however you label it, clear, demonstrable need, or what have you, anything different than what you established in 1985, the railroads will argue with good logic that you meant something by that, that you didn't do that just for the sake of putting a new label on it.

And they will then argue that whatever it is the shipper asked for in most cases, maybe not in every case, doesn't meet the standard of clear, demonstrable need.

Let me give you another example that might bring this home for you. The railroads also say that if you can get the data somewhere else, you ought to have to get it somewhere else rather than from us. Well, that really is going to put a burden on your staff and on you, and I'll tell you why.

It doesn't sound like it at first, but if the railroads say, "Go over to the Energy Information Administration, or the American Petroleum Institute, or The Wall Street Journal, and get the price per gallon of diesel fuel. Don't bother us with it. We're too busy running the railroad," and then we put in what the average price per gallon of diesel fuel is as reported by one of those august institutions, the railroad will come back and say, "Well, that's not what we're paying for diesel fuel."

We've got contracts that allow us to, you know, shape the market, and we hedge, and some of them have been very vocal about how much they hedge. Others, you know, hedge less. And depending on how the price is going, that either works well or it doesn't work well. But the hedge price is always different than the price you read in The Wall Street Journal or get from the American Petroleum Institute.

So now you're going to have a fight. The shipper will put in the price that he got from EIA or API or The Wall Street Journal, and the railroad will come back and say, "No, that's not the price," and now you're going to have a big fight to resolve a dispute.

The far better way to do it is simply tell the railroad, "You know you've got to produce the price of diesel fuel that you pay, your cost." And if the railroad has to produce its cost data, you eliminate all of the disputes because they can't come back in rebuttal and say, "That's not what we pay."

CHAIRMAN NOBER: Well, one sort of distillation of several of the proposals for this would be to have a discovery conference at the beginning of a proceeding, where you sit down, each side brings in their discovery requests, you go through them with the Board, and ultimately settle on, "Here's what we're going to do. Here's what we're going to produce at the outset." How would you all feel about something like that?

MR. DOWD: Mr. Chairman, that's something that the Coal League believes very well could be very useful. Part of the problem is in the evolution of the railroad's recordkeeping, for example. You may go through several proceedings where you ask detailed questions about locomotive maintenance, and in every proceeding you get the Jupiter Report.

Well, after three or four proceedings, you just ask for the Jupiter Report and save 10 questions. But if in between the carrier no longer prepares the Jupiter Report and keeps the maintenance record in some other way, then the answer comes back, "We have no Jupiter Report." Period.

If you had a discovery conference at the beginning, we believe with participation by Board staff, to lend some gravidas to the proceeding, at least there an effort could be made to describe in functional and use terms the type of data that's required, and in a dialogue exchange learn, well, what do you call the file that keeps X? And, yes, we think that something like that could be very productive. It may not be a be all, end all, but it might be helpful.

MR. DiMICHAEL: Chairman Nober?

CHAIRMAN NOBER: Yes.

MR. DiMICHAEL: Excuse me. We very much agree that getting the staff involved at the discovery stage would be a very good thing. There is clearly a concern about making formal changes to the boundaries, as you say, because what will happen -- what we're afraid will happen is that you're right, everyone knows what ought to be produced, and things are produced. If you

make a formal change in the boundaries, then perhaps the argument becomes, well, now things that we have produced in the past no longer need to be produced now.

There is also a concern that, for example, the Board has had several recent decisions in which it looked at railroad investment data, which shippers have been getting for 20 years, and then all of a sudden they are being told that, "Well, we can't get that, or we don't have it." And the Board said, "Well, if you got it, you have to give it."

But that's kind of the thing where there is -- where there was clearly a concern that data that had been gotten for a long period of time now no longer might be gotten. And we very much agree that if the staff gets involved at the discovery stage, it's going to cut through some of that stuff and really help.

CHAIRMAN NOBER: But you still feel that -- I mean, I think the intent of the change in the standard was to clarify the existing practical standard applied by the Board, not to create a new one.

MR. DiMICHAEL: But I think what will happen is that it's precisely -- the creation of a new standard is what is being suggested, and I think the arguments will be made -- and I think clearly the comments of some of the railroads, as the League pointed out in its reply comments, suggest very much that the Board formally changes the standard.

There is -- it is not going to be seen as simply a clarification of the existing law. It's, rather, going to be seen as a change in the standard, and things that were produced before needn't be produced now. I think it -- and I think it is just going to create a tremendous problem.

MR. DOWD: We have an example of that in the Arizona Electric case, where a motion to compel was evaluated by the Board, and in your decision you looked at the need for the data. You looked at the claimed burden and balanced that against the

usefulness of the data. And you looked at the question whether the data could be obtained from another source, and in the end concluded that it had to be produced.

In its comments in this proceeding, BN Santa Fe has taken the position that under your new discovery standard it is unlikely that we would have been required to produce that data. So clearly there is a difference of view as to whether your discovery change would be perceived as merely codifying a process that you already apply, or something new, and I would tend to agree with Mr. McBride that if you propose something new the presumption will be perceived that you intended something new to be done. And that's where we have a concern.

MR. McBRIDE: Mr. Chairman, I'll give you one more perfect example. If you get into that technical conference, whether with the staff or with the staff present before a FERC ALJ, there are certainly categories of things, some of which we have already mentioned and I'll mention them now to make this clear, that there won't be any dispute -- will end up having to be produced, but which we still, under the current process, have to make formal discovery requests to get. One are traffic tapes. The other is transportation contracts of the other shippers.

Now, I think those were the sort of things that, in 1985, the ICC intended the railroads to just turn over. Obviously, under the terms of a protective order, part of the paragraph I skipped over, it said the shipper must provide adequate procedures to protect the confidentiality of the information sought. There's no dispute about that.

But since you issue a standard protective order at the outset of these proceedings, that order could just be expanded to require the production of the sort of thing that you have routinely required.

And by the way, the other shippers, the ones who aren't complaining, don't always like it when their contracts get disclosed. I get calls like that all the time. But you know

what we have to tell them? The Board has made it clear those have to be produced, so there's no point in objecting to it.

Well, the same thing ought to hold true for the railroads. Just produce them.

CHAIRMAN NOBER: Now, you have all to a person objected to putting limits on the number of discovery requests that can be made, even though that's routine in federal court. And, you know, if you look in the federal -- if any of your law partners go to federal court, if you had a case there, if we didn't exist, you'd be limited to -- you'd be limited under the Federal Rules of Civil Procedure.

Now, what is so unique about one of our cases? Does that mean that in a case you have to make 800 requests for discovery you would be limited to 25 in federal court? I just -- I'm having a hard time understanding that.

MR. DOWD: Two comments, Mr. Chairman.

CHAIRMAN NOBER: I mean, I just don't think our procedures are so different from multi-billion dollar commercial disputes that go on in federal court.

MR. DOWD: Your Honor, we are frequently in federal court, and it is true that the federal rules do, and local court rules often do, impose numerical limits on discovery requests. It is also true that the discovery rules are interpreted very liberally in federal court proceedings.

So there is a balance between a simplistic or a limited number of requests and the obligation to search for all documents that are responsive to the request and to produce them as long as --

CHAIRMAN NOBER: I mean, our current standard is, by my fuzzy memory, identical to the Federal Rules of Civil Procedure right now.

MR. DOWD: That's right. As Mr. DiMichael pointed out, what's happened over the years as parties have exchanged requests and documents, the requests have become more specific. And,

really, part of the intent there is to be clear, not be ambiguous, and try to expedite the process by honing in on exactly what it is that's required.

CHAIRMAN NOBER: Eight hundred requests?

MR. DOWD: Well, I'm not going to defend individual cases.

CHAIRMAN NOBER: Individual cases. But that's not honing in, that's 800 requests.

MR. DOWD: And it may very well be that in an individual case one side or the other may overdo it. And we would be confident that you could step in and see that when it happens, and do something about it. But in the ordinary context, the specificity of the requests, which lead to more subparts, can be helpful to zero in on exactly what it is that's required.

And our concern with the limit on the number of requests is simply that it will require the proponent to define its request more broadly. And the more broadly the request is defined, the greater the likelihood of objection, the greater the likelihood of misunderstanding, and the greater the likelihood of motions practice before the Board.

MR. McBRIDE: Mr. Chairman, first of all, under Rule 26 of the Federal Rules of Civil Procedure, in many district courts now one has to produce all of the relevant information that is set forth there at the outset of the case, either with your complaint or with your answer.

So that's part of the reason that the federal rules can succeed in having a limit on the number, because I was in a case against BN, for example, in the United States District Court in Illinois over a contract dispute, and we produced I think 3,000 pages and a list of 30-some witnesses at the outset of our filing. And it produced something like 5,000 pages back, and a comparable number of witnesses with its answer. So that's one answer.

Another answer is I would suggest to you respectfully

there is no more complex rate regulatory standard than the SAC standard applied by any regulatory agency to determine what is a maximum reasonable rate.

You could make this a lot simpler -- Congress could, for example -- if since in most cases if you build a big enough stand-alone railroad you get the rate below 180 percent of variable cost, and the Board ends up prescribing 180 percent of variable cost. It would be real simple to say that 180 percent of variable cost is not only a floor but a ceiling, and that would eliminate a lot of this. But the railroads wouldn't like that.

They asked for this more complicated standard, and they got it. And then we need the discovery in order to meet that standard.

CHAIRMAN NOBER: Well, let me just turn to technical conferences, which you all seem to have agreed would be a good thing. And, you know, based on my three months here, I would seem to agree. How have we gotten to a point where, in the attempt to make adjustments to our standard average costs, you look at movement-specific data, and we have disputes over movement -- on movement-specific data that relate to the number of miles traveled, I mean, or the number of tons per car, which you have a waybill, I mean, those are facts. Those are not -- and the number of miles traveled, that's a fact.

Why are we having disputes about items like this? Why is the Board being asked to -- and I'm going to ask the railroads the same thing. Why are we being asked to adjudicate these kinds of things, taking the staff's time, keeping people here on the weekends, to figure out what are the number of tons per car when the number of tons per car is -- and the equipment manufacturers were just in.

There's a maximum of tons per car, and there's a waybill that shows you the number of tons per car. That's not opinion; that's fact.

MR. DOWD: Well, often, Chairman Nober, the differences are minor, and often the differences are among the adjustments that are made, you know, in the course of the evidentiary proceeding. Something like miles traveled, while at first blush one would say, "Well, the miles are what they are, aren't they?"

CHAIRMAN NOBER: Yes.

MR. DOWD: But if one looks at the railroad timetable, it may get one mileage. And then if the -- they look at train movement records, there may be a slightly different mileage, off by a couple of miles.

CHAIRMAN NOBER: So why would your submissions differ? I mean, why are the parties not able to work that out?

MR. DOWD: Because under the current procedure, where there is no preliminary discovery conference, under the current procedure shippers often are in a position of having to decide whether to stick with the schedule and file their opening evidence, even though they don't have all of the discovery, or delay, and frequently will opt to go ahead and file and use the best evidence they have available.

If that includes, in the mileage example, mileage based on the railroad's timetable, the railroad may come back on reply on say, "No. You've got the mileage wrong, because the train movement records show it's something different." On rebuttal, the shipper usually will say, "We're just going to accept the railroad's miles."

You go through that three-step process, though, because there is no conference at the outset where some of those things might be able to be resolved, and that's one of the reasons why I think the idea is a good one.

MR. McBRIDE: You could have a checklist of all the things the staff spends its weekends now trying to sort through -- how many miles, how many tons per car, whatever -- and just go right down the list and try to get the parties to stipulate to it right at the beginning.

CHAIRMAN NOBER: Well, that might be constructive.

MR. SCHWIRTZ: My only comment there is we've been shipping coal for 20 years, and I have tried to get mileages to the origins that we ship from, and I have never gotten the same one every time I've asked.

CHAIRMAN NOBER: Well, I'll tell you, I'm going to defer to my colleagues for questions for a few minutes.

Vice Chairman?

VICE CHAIRMAN BURKES: Just one quick question I know that Mark and Kelvin and also Mike reinforced concerning the -- you mentioned that the railroads no longer keep movement-specific, and then you go on to say that not doing that, then the variable cost increases.

Two questions. Number one, can you give a specific example of that?

MR. DOWD: Well, road property investment is one. Historically, you are able to determine with relative specificity the road property investment that was attributable to a particular coal movement using a combination of records. And the carriers did the same -- very same thing.

If you look back in the report of decision in the West Texas Utilities case, for example, both the complainant and the defendant used the BN's records of specific road property investment to do that particular component. There was a little disagreement over how to interpret it; you resolved the disagreement. But both parties used the same records.

Now we are told that those records are no longer reliable, because they don't include unattributable property investment -- the office building or the yard that has to be shared by every shipper on the system.

In order to go deeper, very often we run into what we all call the management cost problem, which is the ICC, a number of years ago, issued decisions that allowed the railroads to withhold from discovery internal management cost data, which was

deemed to be movement-specific data that was only used for marketing and rate-setting, not for regulatory purposes.

The problem, or part of the problem, as we see it, is that some of the data that previously was available to us in discovery now has slid over into management costs and are no longer available in discovery.

That's the kind of a problem that an initial conference perhaps could address -- if not resolve, at least identify as something that was going to be an issue of contention in the case, and the staff, you know, has a heads up as to, well, this is going to be an important issue, and these are the positions of the parties at the outset.

VICE CHAIRMAN BURKES: The second question, then -- and some of our staff folks probably know the answer to this, but I don't -- are there any requirements that the railroads keep this data specific?

MR. DOWD: No. Part of the problem is that in streamlining its regulations in the wake of the Termination Act, the Board did remove what had been rules requiring the retention of certain records. And some of those records were probably only retained because they were required by regulation. And once the regulation was lifted, the records were no longer retained.

Well, as Mr. McBride pointed out earlier, the carriers are parties to a compact with the Federal Government. They have the franchise, and they are required to be regulated as a consequence. But when the requirement of keeping records that were only used for regulation was dropped, I think some of those records dropped out as well.

So the answer to your question is other than through the discovery process, records that used to be kept as a matter of regulatory compliance no longer are, and that, again, is a part of the problem.

MR. DiMICHAEL: I would just add to that that because there is no set requirement, I mean, for the form of records,

this makes the discovery process all the more important, because then you need to figure out exactly how the railroad is keeping the particular records. It's not something that is set there in the CFR.

VICE CHAIRMAN BURKES: I have no other questions.

CHAIRMAN NOBER: Commissioner Morgan?

COMMISSIONER MORGAN: Let me just follow up on a couple of the questions that the Chairman asked.

First of all, with respect to the discovery standard, now, if our intention was to reflect the recent evolution with respect to our discovery decisions under the standards we set in those decisions, then you would suggest, as I hear it, that we just let those decisions stand and not impose some other standard. Is that -- have I heard that correctly?

MR. McBRIDE: That is correct. Let the decisions speak for themselves.

COMMISSIONER MORGAN: Now, sticking to discovery for a minute, I think that we all would agree that the discovery process has gotten out of hand, and that we need to pull it back in some sort of control.

The question really is how best to do that. Do you start establishing limits of some kind or another on the time period or the type of evidence? Or do you use some other procedure to set the limits, to get this process under control?

Now, what I hear at least some of you saying is that the staff technical conference approach could very well be a way to get this whole process under control, as opposed to establishing particular limits on timeframes and document requests and number of requests, and so forth. I'm just -- am I -- have I got that right?

MR. DOWD: I think -- well, from our perspective, it will be a combination. The preliminary technical or discovery conference, where parties not only went through the discovery plan but with the -- in the presence of staff agreed upon

timelines, milestones, for when documents were going to be produced, so that we avoid the "dump on the 75th day" problem, would be part of the solution.

Frankly, we think that the suggestion by the AAR that there be an agreed-upon end point for data to be used in a case is one that may have merit. Now, we're concerned that the way they presented it it was unclear whether they intended it to apply to both sides or just the shippers.

But assuming that you could get it right and have it apply across the board, then both sides would know, all right, last full quarter before the opening evidence file, that's where the line is drawn. No subsequent data will be submitted. No subsequent data can be requested.

If you have sort of a combination of those two, and they were drawn properly and drawn fairly, that might go a long way. And, frankly, given the importance of discovery, as my colleagues pointed out under the guidelines, we would certainly favor an approach of incremental reform, if you will -- try the conferences and see how much that helps -- before moving on to consider, you know, other steps, and the last one being considering any change in the standard.

MR. DiMICHAEL: We very much agree with that, and I'd maybe add just one more thing. To add the possibility of the staff becoming involved in a conference after a motion to compel, and the idea that a motion to compel would be decided very quickly, is going to help this process.

I think there's at least some aspects of this where in virtually every litigation, not just before the Board, not just before the courts, one party often is advantaged by delay, and the other party is not.

And there is at least some aspect of this where if you know -- if both parties would know that whatever they do a decision is going to come out, and it's going to come out quickly, that's going to be an incentive to -- for both parties

to figure out a way to do this without going to motions to compel. Or at least if you do have motions to compel, the case doesn't sit. Rather, the case moves forward quickly.

And, you know, maybe you don't like the answer, but you've got an answer. That is sometimes better than not having one.

So I very much agree with Mr. Dowd. Getting the staff involved to narrow, sharpen, hopefully resolve these things early, getting the staff involved to see about resolving these things at a technical level, at a motion to compel stage, and deciding motions to compel quickly, is -- I think a combination of those is going to clear away a lot of the underbrush here.

MR. McBRIDE: Let me just add that FERC ALJs may not be able to get these parties to agree on whether a product in geographic competition should be included or excluded, which is one of the things we couldn't agree on years ago. But they very much are capable of resolving discovery disputes. They do it every day.

And I should add, Chairman Nober, by the way, that FERC does use the stand-alone cost approach for the regulation of oil pipelines, since they are regulated under the Interstate Commerce Act. And it took several years, by the way, to litigate some of those cases over there, but those ALJs are familiar with the same kinds of problems in the production of the data there.

So I think a combination of an ALJ presiding, you know, to lend a little judicial authority, and the staff of this Board assisting on technical matters, would be a powerful combination at the outset of a case.

CHAIRMAN NOBER: That's helpful. Thanks.

COMMISSIONER MORGAN: But I think, just to follow up on your point, Mr. DiMichael, what we're trying to do is to create a situation in which -- and this is really what the Board, I think, has been about for a number of years, is to try to separate the wheat from the chaff.

So you have a process in place that removes as many issues as possible, so that then you are left with the core issues that do need to be resolved in a more formal way. Now, maybe they're resolved through a staff effort on a motion to compel, or, again, ultimately by the Board in the larger decision. But that's what we're trying to piece together here.

MR. DiMICHAEL: I very much agree with that, that if you have a process whereby you can resolve some of the chaff, formally you narrow the wheat to the kernels, and then decide the wheat quickly, I think you're going to -- maybe we're trying to --

COMMISSIONER MORGAN: Cut the wheat quickly.

MR. DiMICHAEL: Exactly.

(Laughter.)

Maybe we're trying to extend this --

COMMISSIONER MORGAN: You're out of my element, by the way.

(Laughter.)

MR. DiMICHAEL: That's right. I'm far beyond here.

But anyway, I think that's what we can best do to move this stuff forward.

COMMISSIONER MORGAN: Can I just ask one more?

CHAIRMAN NOBER: Absolutely. Please.

COMMISSIONER MORGAN: Let me move to mediation for a moment. It seems to me that what we're really focused on is, when can mediation be the most effective? And how can it be most effective?

And just putting some of the comments together, it sounds like we could -- one way we could go is to combine technical staff conference efforts with respect to discovery, perhaps at the beginning of the process, and then perhaps have mediation after all of the evidence is in, is one way -- did I hear -- I think perhaps you, Mr. McBride, suggested that?

There has been some suggestion of doing mediation,

rather than at the beginning, somewhere in -- during the course of the proceeding itself.

MR. McBRIDE: And I'm not opposed to the mediation issue coming up, if you had a technical conference, say, before a FERC ALJ at the beginning. Some shippers -- you heard Mr. DiMichael say that -- with somewhat more confidence perhaps than others, that this will work.

I think the coal shippers understand that there is so much at stake, and they have been through such a long negotiation process that has broken down, unfortunately, before they ever get there, that to then file a complaint and then immediately assume that parties are now going to find a way to resolve their differences is unrealistic, at least in the overall. But it may help resolve some of these fact-specific problems that are so bedeviling your staff.

And then, yes, when the parties are not tied down in answering the complaint, producing discovery, drafting motions, and all the rest of it, when the evidence is in and you've got those nine months or less to decide the case, that's a great time to try to get the parties to sit down, when they're not otherwise distracted, and now see whether the other side has made a sufficiently good case that you could mediate something.

CHAIRMAN NOBER: Well, I was struck by that, too, if I could just follow up. I mean, do you think -- I mean, that's a helpful suggestion. Do you think that if the parties have spent the money on their case at that point that mediation would be successful then?

MR. DOWD: That's the concern, frankly, that we would have, Chairman Nober, that to have mediation at the conclusion of the evidentiary phase to be sure increases somewhat the chances that the Board won't have to decide the case. But the parties have already spent the money. And at that point, positions may be more deeply entrenched, because I already have my umpty-ump million dollars in this case.

Our preference would be -- the Coal League's preference -- would be if you're going to have mandatory mediation, that you do it upon the filing of the complaint, during the process of serving and responding to discovery, because for mediation to succeed, it seems to us, it can't just be between lawyers.

CHAIRMAN NOBER: True.

MR. DOWD: The stakeholders have to participate. The business people have to participate. And while it is true that non-legal staff resources are employed in the collection of data for discovery, the decisionmakers don't generally have to get involved in that. And I don't think it would be a problem of the people you need for mediation not being available because they're off doing discovery.

And we think that having participation by the business people would be critical to any measure of success. So I guess we would prefer, if you're going to do it, that you do it after the filing of the complaint, so that it's certain as a matter of law that the mediation is over a matter subject to the Board's jurisdiction. And that it be done simultaneous with the initial procedural phase of the case.

CHAIRMAN NOBER: Commissioner Morgan, if I could follow up with one question about mediation. If I could summarize -- if I heard what you were all saying, it's that all of you think mediation is a good idea, just nobody thinks it will work.

(Laughter.)

MR. DOWD: I think what you're hearing is that we're skeptical that it will work to completely settle a dispute that has taken a year or more to build up. I think all of us are optimistic that it can be useful to perhaps resolve discrete issues or lead to stipulations of particular matters that otherwise would have to be litigated.

So, I mean, I think we all are willing to give it a try as a way of reducing the matters in dispute. We are just not overly optimistic that it's going to lead to wholesale

settlements.

MR. DiMICHAEL: Perhaps we're a little more optimistic than that, but I think you have to be kind of realistic on this, that there is -- by the time you get to a complaint, things have gone down fairly far, and it's going to be tough for a mediator to bring all of that together. But I'm not sure that I would say, "Well, there's no chance at all."

And, frankly, if you can -- if you're at a point where perhaps the parties are close, but not quite close enough, maybe a mediator might be able to give them a shove.

CHAIRMAN NOBER: I mean, that's one thing that, you know, we don't know, which is, how close were you able to get before, as Mike McBride said, the failure of the commercial process, and you had a breakdown in it, and --

MR. DiMICHAEL: Sometimes in these things you are not even within hailing distance. And other times, you know, you get part of the way there, but you're just not there -- quite there.

COMMISSIONER MORGAN: But certainly our job is to try to handle the case that comes to us. And so what we're trying to do is to figure out a way that the concerns raised about costs and burdens and delay are addressed through the process of handling the case. So, I mean, I think it gets back to, again, what I said, which is, where is mediation the most useful in the process? At the beginning? After evidence?

MR. McBRIDE: It doesn't have to be one or the other, and I would just build on what Mr. Dowd said in one respect. If you go to that initial technical conference, and if the business people for the railroad are told they've got to produce the traffic tapes, and they've got to produce what they pay for diesel fuel, and they've got to produce transportation contracts, and right on down the line, they might be a little more willing to settle at that point.

And, conversely, if the shipper is told, "No, you're not going to get, you know, 800 requests granted," you're going

to have to be more reasonable, and the shipper may start to reevaluate his options. So at the outset, you know, the discovery process, once it's developed, may encourage people to come together.

And then later -- I fully grant Mr. Dowd's point that once parties have spent the money they may want to just roll the dice and see what the decision is. But you can't be sure that that's always the case. I don't see what the harm would be if once the evidence is in, you know, and the case is submitted to you, you then spend a brief period of time trying to mediate it again to see if that's brought the parties any closer together.

But I just would say, lastly, I think it would be an unnecessary expense and burden to submit parties to the mediation if they just are unwilling to mediate. I just think you ought to allow people to opt out, because otherwise we're just wasting our time.

We've found that before in these matters. I'm not trying to be critical. These are terrific lawyers back here. But people make their decisions, they make their judgments about what the decision is going to be, and they base their actions accordingly, or they've got instructions from their clients, and that's just that.

And so sometimes you really ought to just recognize that there's a time and a place, and I think that's what you were suggesting, too, former Chairman Morgan.

CHAIRMAN NOBER: One other sort of theme I think I've heard from all of you is that more Board management at the outset of a case would be helpful.

MR. McBRIDE: Yes. Yes.

MR. DiMICHAEL: Absolutely.

CHAIRMAN NOBER: Either whether it's to bound settlements or to bound discovery disputes or to help guide the process. And I'm not sure that, you know, our -- we've given ideas on this, and I think you all have given some ideas on this,

but I'm not sure we have that fully -- you know, that's something that we have to go back and look it.

But I think I hear you saying that more Board guidance at the beginning would be a good thing. It would help keep the process within bounds. Is that --

MR. McBRIDE: Yes. And if you analogize to the United States District Courts again, there are so burdened down these days with criminal and other matters that when you bring a civil case to them, a long time ago when I started out you could just, you know, count on your case moving quickly.

Now the first thing they do is tell you -- that's what Rule 26 was about -- you know, have you produced everything the rule requires you to produce? And the second thing they make you do typically is go see a magistrate judge and have a discovery conference. And then the third thing they do is tell you to try to get all the facts resolved, so that they can have cross motions for summary judgment and never hold a trial.

And then you get down to the core legal issues that divide the parties, and that's the kind of process that I think you ought to be driving toward.

MR. DiMICHAEL: I think having the Board staff involvement is going to kind of cut through, get to, is any posturing going on? Is there any, you know, sort of delay things going on? I think a more active management of the cases by the Board staff would be very helpful.

MR. DOWD: We would agree with just the caution that we recognize that your staff is already probably overburdened.

COMMISSIONER MORGAN: Not probably.

(Laughter.)

MR. DiMICHAEL: And I know they can't nod their heads back there.

(Laughter.)

COMMISSIONER MORGAN: No, they can't.

MR. DOWD: They're going to agree, yes.

And while we certainly agree that having some participation by staff in an early technical conference could be very productive, ultimately it's the responsibility of the parties to manage the litigation of their case. And, you know, we would want to make sure -- we would struggle hard to not add appreciably to the burden on the staff by imposing more and more duties on them.

It's, frankly, not their role, and it could lead to delay, because if you have limited staff and they've got to attend to many, many matters, they're going to have to figure out how to schedule it all. So we think that involvement would be helpful, but we would proceed with caution.

CHAIRMAN NOBER: I agree, although, you know, in the long run -- and, you know, I have to look at this from our total staff management -- we can spend fewer hours analyzing, you know, differences, technical differences, and resolving those later on.

If we were able to put some investment earlier on in the process, that might be a balance that, you know, for the agency is worth making, if that can help, you know -- but I agree with you that the parties -- the litigants ultimately have to manage their litigation. I think that's absolutely right.

Well, look, I'm sensitive to your comments, to all of your comments before, about, you know, we're here to look at procedure and not substance. And I know that that's a very difficult line to draw sometimes, and sometimes substance is procedure and the other way around.

And one question that I have -- and this is a straw man, so I just throw it -- I just preface it that way -- is, would more certain -- I know that a lot of the litigation before us is about looking at the variable costs and making adjustment -- you know, movement-specific adjustments and looking at what are the characteristics of the railroad.

If you had more certainty in how we were going to apply the variable cost test, would that help or hurt resolving

disputes?

MR. DOWD: We think we have a good deal of certainty as to how you apply the variable cost test. The statute says to use unadjusted URCS costs with adjustments approved by the Board. And you have, in a long line of decisions, adopted adjustments that are appropriate -- the speed/factor/gross ton formula, for example. You have expressed a preference for movement-specific data where it can be demonstrated.

And so you parse in individual cases -- ha the party proposing the movement-specific adjustment adequately supported their adjustment? If so, you use it. If not, then we go to system average.

We think there is a fair amount of certainty in the standards and the process. What differs from case to case often is the quality of the evidence. If you're proposing a movement-specific adjustment to locomotive capital, have you adequately supported that adjustment with your evidence? And, frankly, that's a standard that we're prepared to continue to live by.

MR. DiMICHAEL: I agree with that.

CHAIRMAN NOBER: Okay. Well, thank you. But as I said, I am, and we all are, sensitive to the differences between the two, and sometimes I think in this proceeding, you know, it's hard to differentiate one from the other, because process can be substance and substance can be process. And, you know, we all need to be mindful of that.

Are there any further questions? Well, if not, we've had you for almost two hours. So we appreciate your patience --

COMMISSIONER MORGAN: Thank you for your thoughts.

CHAIRMAN NOBER: -- and candor and sitting through our questions.

And why don't we take a brief 15-minute break and reconvene at 12:30.

(Whereupon, the proceedings in the foregoing matter went off the record at 12:16 p.m. and went back on the

record at 12:29 p.m.)

CHAIRMAN NOBER: Let's hear from our last panel. Why don't we come on up? Is everyone here? Okay. Well, we'll hear from our railroad panel: Sam Sipe from the Association of American Railroads, Rich Weicher from BNSF; Paul Moates from CSX; James Squires from Norfolk Southern; and Mike Hemmer from Union Pacific.

Again, with no rationale other than that is the way it is written, why don't we start with you, Mr. Sipe? Again, do not feel compelled to use all 30 minutes.

COMMISSIONER MORGAN: Since these are all lawyers.